

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

77-7019

To be argued by .
ALAN R. WENTZEL

United States Court of Appeals
FOR THE SECOND CIRCUIT

PAUL G. GARRITY,

Plaintiff,

and

GARRITY INDUSTRIES, INC.,

*Plaintiff-Appellant,
Cross-Appellee,*

—against—

SOCIETE LES PILES WONDER,

*Defendant-Appellee,
Cross-Appellant,*

and

WONDER CORPORATION OF AMERICA,

Defendant.

**On Appeal and Cross Appeal from the United States
District Court for the District of Connecticut**

**COMBINED REPLY BRIEF AND ANSWERING BRIEF
ON CROSS APPEAL FOR PLAINTIFF-APPELLANT,
CROSS-APPELLEE**

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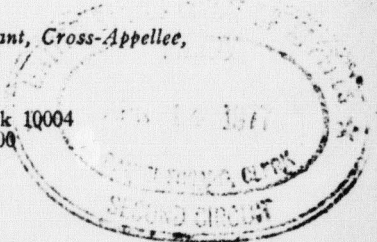


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COMBINED REPLY BRIEF AND ANSWERING BRIEF ON CROSS APPEAL FOR PLAINTIFF-APPELLANT, CROSS-APPELLEE

Plaintiff-appellant, cross-appellee Garrity Industries, Inc. ("Garrity") submits this combined brief (1) to correct certain of the more significant factual misstatements

and omissions of the combined brief of defendant-appellee, cross-appellant Societe Les Piles Wonder ("Piles Wonder") and (2) to answer and reply to Piles Wonder's misconceived arguments of law.

REPLY BRIEF

Facts Proved at Trial

A. The jury found that Piles Wonder delivered 160,000 defective flashlights to Garrity

There can be no dispute that by returning the credit portion of the verdict for Garrity of \$65,900.00, the jury found that 160,000 defective flashlights were delivered by Piles Wonder (A492, 516),* (DB11).** Contrary to Piles Wonder's assertion that "[t]he credit portion of the verdict was directed by the Court" (DB2), it is clear that only the amount to be credited for each flashlight found defective, *i.e.* 41¢, was directed by the Court pursuant to stipulation of counsel, and that the number of defective units was explicitly left to the jury's resolution (A492). Piles Wonder's own admission that the jury found 160,000 units defective (DB11) is the short answer to its argument that only its May and June of 1972 production was defective, that only the July 1972 deliveries of 108,000 flashlights included such defective units (DB2-3), and that therefore withholding of payment for the prior deliveries was wrongful.*** Moreover, the record amply demon-

* References to "A" are to pages of the Joint Appendix.

** References to "DB" are to pages of defendant's combined answering brief and main brief on cross-appeal.

*** We note in passing that Piles Wonder's argument that only the July deliveries were defective assumes that payment thereon was not wrongfully withheld and that an award of interest on such payment (\$30,000.00) is therefore without justification (DB3).

strates that the defective production was not limited to May or June, and that delivery of defective units was not limited to July.

First, Piles Wonder's argument ignores its own testimony that it *discovered* in May or June of 1972 that flashlights identical to those sold Garrity, and manufactured at the same plant, were defective (A269, 271). The same officer of Piles Wonder testified that he learned of the defective nature of the units by way of complaints from its clients which could only be registered after the units had been distributed, "been with the client for some time, and he in turn has received the complaints about defective items" (A271). This, of course, places the period of defective production well before May or June of 1972.

Second, to establish that only the July delivery was defective, Piles Wonder relies on the fact that Garrity did not report its complaint to it until August 25, 1972 (DB4). This reliance conveniently bypasses the uncontradicted testimony that Garrity began receiving complaints from its customers in June and July of 1972 (A110), and that some 42 days would necessarily expire from the time Garrity received delivery (after an additional 20 days' ocean voyage (A331-32)) for the flashlights to be available to consumers who could discern the defect (A401-06). This effectively coincides the period of defective deliveries with that of the deliveries for which Piles Wonder sought payment.

Referring to a meeting on September 1, 1972, between representatives of Piles Wonder and Garrity, Piles Wonder alleges that one of its officers "advised Garrity that he was aware that a batch of lights manufactured in May or June of 1972 (A309, 352) had the switch defect, [and] that Piles Wonder discovered the defect in August (A308) . . ." (DB5). One searches the record in vain for support of this statement. The only testimony Piles Wonder of-

ferred on this point was that at the September meeting, Piles Wonder acknowledges that it experienced defect problems in flashlights distributed in Europe by Piles Wonder (A352), but that at the time of the September meeting it knew of neither the cause of the defect (A215-16), nor the period of defective production (A260). Indeed, Piles Wonder did not advise Garrity of the cause of the defect until December 6, 1972 (A540). In any event, as indicated above, Piles Wonder discovered that there was some sort of defect in May or June of 1972 (A270-71), which would place the period of defective production sometime prior thereto. Finally, it should be noted that defective flashlights manufactured in late 1971 and early 1972 were received in evidence at trial (A383-84).

Thus, the jury was entirely justified in rejecting Piles Wonder's contention that only 108,000 flashlights delivered in July were defective.

B. Piles Wonder's credit agreement

Piles Wonder states that credit for the defective units, "whatever the amount, had been available to Garrity as early as September 1, 1972" (DB2). There is no dispute that Garrity was at first offered credit at its "true cost price for the defective lamp" (A535), at a time when Garrity was receiving substantially increased complaints, and when, by Piles Wonder's own admission, there was no way for Garrity to tell how many of its flashlights were defective (DB7). However, Piles Wonder subsequently reneged on the original promise by refusing any credit on four of the invoices covering delivery of defective units, and limiting Garrity to a 6% credit on the remaining invoices (A573). Garrity's reject rate was, however, much higher than normal (A60-61), and Piles Wonder could not identify any policy with respect to credits for defective lights (A334-35, 392). Finally, it must be

noted that the crux of the agreement reached at the September meeting was that Garrity would be shipped first-quality replacements for the defective flashlights (A65-72, 533-37). This portion of the agreement was also dishonored (A328-29, 539), notwithstanding that Piles Wonder was advised that its failure to ship replacements would destroy Garrity's Christmas sales and the future market for this flashlight (A537).

REPLY ARGUMENT

POINT I

The award of interest on the full amount of the unpaid invoices was error.

Acknowledging as it must that the trial court awarded interest on an amount far greater than the sum due,* Piles Wonder has chosen to reargue its version of the facts, ignoring both the jury verdict to the contrary and the law of Connecticut and elsewhere which limits an award of interest, if any be granted, to the net amount found owing in these circumstances.

The applicable Connecticut case law is fully set forth in Garrity's main brief and it demonstrates (a) that unless money due has been wrongfully withheld, no interest may be awarded; (b) that the jury verdict in Garrity's favor determined that payment was not wrongfully withheld; and (c) that if any interest is to be awarded, the rule stated in 5 *Corbin on Contracts* §1051, at 308 (1964) applies:

"If the buyer's counterclaim [is] one for unliquidated damages for defects in the goods sold to him, the amount of this claim after determined by the court would be subtracted from the seller's total claim, and interest would be allowed only on the balance so found."

* Even in its counterclaim Piles Wonder conceded that it was not owed the full amount of the invoices and demanded interest only on the net amount it claimed was due (A29, 34).

The cases relied upon by Piles Wonder are either clearly inapposite, or call for reversal of the award of interest in this case. In the latter category fall *Cecio Brothers, Inc. v. Feldman*, 161 Conn. 265, 287 A.2d 374 (1971) (cited DBS-9), and *Bertozzi v. McCarthy*, 164 Conn. 463, 323 A.2d 553 (1973) (cited DB11), discussed in Garrity's main brief at 9-11. *Cecio Brothers* affirmed an award of interest on the balance due seller for goods sold and delivered where the goods were not defective and the seller "performed his work in a good and workmanlike manner." 287 A.2d at 379. Thus, as a necessary premise to the award of interest, the court found that the seller did not breach his contract, which Piles Wonder admittedly did here. In *Bertozzi v. McCarthy*, the court refused to award interest on a balance due where non-payment of the balance was caused by vendor's breach of the contract. 323 A.2d at 556.

Clearly inapposite to the case at bar is *Bernhard v. Rochester-German Insurance Co.*, 79 Conn. 338, 65 A.134 (1906) (cited DB11), where interest was awarded in a suit on a policy of fire insurance from the time the insurer wrongfully repudiated liability thereon. In *Bernhard*, of course, the insurer raised no counterclaim to offset the proceeds payable under the policy, and it was found that the insurer was without justification in denying liability. In the present case, Garrity sought damages arising from Piles Wonder's breach of the very transaction for which Piles Wonder sought payment of \$133,000, and was vindicated to the extent of \$105,900.

Nor does *L. Albert & Son v. Armstrong Rubber Co.*, 178 F.2d 182 (2d Cir. 1949) (cited DB9) offer Piles Wonder any comfort. There, the seller made partial late delivery of equipment which conformed to the specifications of the contract. *Id.* at 185. Chief Judge Learned Hand found that the buyer rejected delivery under the

Uniform Sales Act, but that the buyer's use of a portion of the equipment with knowledge of the seller's breach constituted a conversion for which the seller was entitled to recover, not on the contract, but in quasi-contract. *Id.* at 188. In the case now on appeal, the goods delivered by Piles Wonder were, unknown to Garrity, defective and Piles Wonder sued on the contract for the price of all goods delivered, not in quasi-contract for the value of the use of defective goods. In any event, as was noted in Garrity's main brief at 12-13, in *Albert & Son*, the Second Circuit not only awarded interest on the value of the equipment to seller, but it also awarded interest to the buyer on the damages caused by seller's breach. The trial court in this case awarded interest on the full amount of Piles Wonder's claim of \$133,000, undiminished by Garrity's verdict of \$105,900, and awarded no interest to Garrity on the amount of its award. In reply to Piles Wonder's characterization of Garrity's claim for interest as "fatuous" since it never asked for interest (DB2), it only need be noted that Piles Wonder, in its complaint, never sought interest on the full amount of the unpaid invoices as was ultimately awarded, but only on the balance thereof after deducting credit for the defective flashlights (A29, 34).

Piles Wonder attempts to avoid the impact of the case law by arguing that only the July 1972 shipment of 108,000 flashlights was defective and therefore payment of all other invoices was wrongfully withheld. As noted in the above statement of facts, however, the evidence showed that all of the 1972 shipments were infected,* and

* 178,954 flashlights were returned to Piles Wonder by Garrity (A139-42) and another 12,441 had been returned by Garrity's customers by the date of trial (A143). The jury found 160,000 to be defective and this amount, of course, did not include the many more thousands undoubtedly thrown away when they failed to operate by disgusted consumers (A104-05).

the jury's verdict clearly rejected Piles Wonder's arguments.

Next, Piles Wonder seeks to convert the legal issue as to the award of interest into a factual one, relying on the trial court's evaluation of Mr. Paul Garrity's "demeanor" (DB10) to establish that payment was wrongfully withheld. An award of interest, however, lies within the trial court's discretion when there is a finding that money due has been wrongfully withheld. The evidence adduced at trial was all weighed by the jury, which returned a verdict for Garrity in the amount of \$105,900 for the defective flashlights. Explicitly, this verdict means that Piles Wonder delivered defective goods. Implicitly, it means that payment under the circumstances could not have been wrongfully withheld. Thus, as a matter of law, there was no basis upon which the trial court could exercise its discretion in awarding interest. It was the jury's function to assess Mr. Garrity's demeanor and determine whether he rightfully withheld payment because of a defect in the goods delivered or whether he was simply trying to avoid his obligations. Even if the trial court disagreed with that assessment, it was not free to disregard it and enter a judgment of interest utterly inconsistent with the jury's verdict.

Finally, Piles Wonder attempts to circumvent the clear application of *Conn. Gen. Stat. Ann. §42a-2-717*, UCC 2-717, by arguing that Garrity never gave sufficient notice to enable it to rightfully withhold payment on the invoices (DB5, 9). As was noted in Garrity's main brief, at 13-14, the official comment to §2-717 indicates that notice of intention to withhold the price is only necessary if a buyer wishes to avoid a default within the meaning of the section on insecurity and the right to assurances, *i.e.*, *Conn. Gen. Stat. Ann. §42a-2-609*, UCC 2-609. There is no issue in this case as to insecurity and right to assurances. This

comment continues to indicate that no formal notice is required, and that "any language which reasonably indicates the buyer's reason for holding up his payment is sufficient." Certainly, Garrity gave Piles Wonder notice of his reason, that is, the high rate of defective lights, for holding up payment on the invoices in both his letter of August 25, 1972 (A532), and at the September meeting (A173). In *Southern Concrete Products Co. v. Martin*, 126 Ga. App. 534, 191 S.E.2d 314 (1972), it was held that a buyer's notice to seller that the goods delivered were defective was sufficient under UCC 2-717, and that any such notice is sufficient if it informs the seller that the transaction involves a breach and opens the way for normal settlement through negotiations. See also *A&G Construction Co. v. Reid Bros.*, 547 P.2d 1207 (Alas. 1976). It is indisputable that Garrity's letter of August 25 opened the way for settlement negotiations by way of the discussions at the September meeting and subsequent correspondence (A532-543). It is within the context of these discussions and Piles Wonder's failure to ship replacements as promised, that Garrity sent a letter on November 27, 1972, from which Piles Wonder quotes in part (DB6). This letter indicated Garrity's attempt to resolve the differences of the parties caused by Piles Wonder's breach, rather than unilaterally refuse to pay the invoices. The letter continues, in pertinent part:

"However, we have heard absolutely nothing from you since we called this to your attention and I understand you knew about this problem before we discovered it on the American market.

I think it is only right that if you value our collaboration that you would have settled any problems that have been caused by quality before this which I know is normal on the part of most manufacturers. Even the replacement of the merchandise

that was promised has not been sent to us and we had to turn down orders because we have not been able to supply our customers a quality product.

We are now approaching the first quarter of 1973 and again we ask that we be notified what deliveries you will be able to supply us with during next year so that we can announce our promotional plans accordingly. Please let me hear from you at your earliest convenience." (A543).

Thus, Garrity attempted in good faith to resolve the problems caused by Piles Wonder's breach, and its withholding of payment was a legal remedy specifically authorized by §2-717. The award of interest, however, effectively negated this remedy and was, therefore, improper.

Interest may be awarded in civil actions as damages for the wrongful detention of money after it becomes payable. *Conn. Gen. Stat. Ann.* §37-3a (Supp. 1973). In a sales transaction, interest awards are premised on the notion that a buyer should not enjoy the use of goods delivered while preventing the seller from enjoying the use of the purchase price. When the goods are defective, however, and the parties agree to their return to the seller, the buyer has not enjoyed the use of the goods and the seller is not entitled to payment. In the present case, Garrity incurred the cost of shipping and customs duties (A57-58), found the goods to be defective and returned them, and suffered loss of its profits from being unable to enjoy the use of the goods. Piles Wonder, on the other hand, breached its warranty by delivering defective goods, yet enjoyed the use of the goods for repair and resale (A12). The award of interest in these circumstances is manifestly unfair, contrary to law, and should be reversed.

ANSWERING BRIEF ON CROSS APPEAL

Issue Presented for Review

Did the District Court commit reversible error by refusing to include a disputed issue of fact in its legally correct charge to the jury on mitigation of damages?

Statement of the Case

This is a cross appeal by defendant, Piles Wonder, from so much of a final judgment on a jury verdict entered October 21, 1976, as awarded plaintiff Garrity lost profits in the amount of \$40,000 as consequential damages for Piles Wonder's breach of warranty.

Statement of Facts

It is submitted that the statements of facts contained in the briefs of the parties obviate further recitation.

ANSWERING ARGUMENT ON CROSS APPEAL

POINT I

The District Court correctly charged the jury on the law of mitigation of damages, and did not exclude from the jury's consideration the factual issue of the Mark IV as a replacement.

Without indulging in objurgation, Garrity respectfully submits that Piles Wonder's four page brief betrays a hopeless confusion of the law applicable to its cross appeal and of the theory upon which Garrity's case was presented to the jury. It also belies any sincere pursuit by Piles Wonder of the issue it raises on cross appeal.

Piles Wonder commences its argument by quoting in full *Conn. Gen. Stat. Ann.* §42a-2-712 (UCC 2-712) (DB13), which applies to a buyer's remedy for failure of delivery, repudiation, rejection or revocation. It is clear from the charge to the jury, however that the case was not submitted on any of these theories. The Court presented the case to the jury solely on a breach of warranty theory (A488, 493), the remedy for which is found in UCC 2-714, not in UCC 2-712. Indeed, had the facts of this case allowed Garrity to rely on UCC 2-712 for its remedy, it would have been entitled to cancel the contract, and Piles Wonder would not have received its directed verdict in the amount of \$133,446.32 on its counterclaim for the price (A495).

Under UCC 2-714(2), Garrity recovered a credit of \$.41 for each defective flashlight (A491-92) for a total of \$65,900 (A516). Pursuant to UCC 2-714(3), Garrity also recovered lost profits of \$40,000 as consequential dam-

ages under UCC 2-715(2) (A516). Although Piles Wonder's brief is garbled in its discussion of the scope of its appeal, it is apparent from its conclusion (DB17) and argument that it appeals only from the award of \$40,000 as lost profits. The argument is, however, particularly ill conceived.

On its cross appeal, Piles Wonder does not attack the legal sufficiency of the jury charge (A495), but complains that the District Court declined to include in its charge Piles Wonder's version of the disputed factual issue as to whether the Mark IV constituted reasonable cover. Thus, Piles Wonder's cross appeal is based solely on the trial court's failure to instruct the jury that Garrity would not be entitled to lost profits if it could have prevented such loss by replacement of the defective flashlights with a different flashlight being test-marketed by Garrity, the Mark IV. Piles Wonder admits, however, that the Court's general instruction concerning the duty to mitigate damages was entirely correct.

In ruling on the parties' requests for instructions to the jury, the trial judge observed that he would not include a charge as requested if the request included facts that were in dispute (A421). He found that "almost all" of Piles Wonder's requests were simply "statements of facts that might very well be in issue" and, accordingly, refused to charge them (A423). Piles Wonder's request concerning mitigation of damages also fell into this category, and the Court, while accepting a portion of the request which correctly stated the duty to mitigate damages, refused to charge that portion dealing with the Mark IV flashlight (A423).

The Court's charge concerning mitigation of damages was read to counsel before closing argument, with no exception or objection noted by either side (A434-36). The two examples of possible mitigation of damages which the

Court referred to, *i.e.* accepting Piles Wonder's offer to repair or purchasing new flashlights from Piles Wonder for cash, each referred to undisputed facts, while the example involving the Mark IV did not. Thus, it was undisputed that Piles Wonder had offered to repair the defective flashlights (A540) and had offered to ship replacements (A535) and the questions for the jury to determine were whether Garrity acted reasonably in refusing to accept repaired goods for shipment to its customers (A81) and whether Piles Wonder had broken its promise to send replacements (A91).

The use of the Mark IV as a reasonable cover for the defective flashlights in order to mitigate damages, however, was very much at issue throughout the trial. The Mark IV had a limited test market production of 100,000 units introduced in late 1972 which was quickly sold out (A400, 575). Just as Piles Wonder had several disposable flashlights with different shapes and prices in their product line (A390-91), the Mark IV was intended as a separate product, with different physical characteristics and a much higher selling price, to form part of Garrity's product line (A399-400). It was only after Piles Wonder had terminated Garrity's distributorship (A544) and failed to ship replacements, that Garrity urged its salesmen to promote the Mark IV with distributors (A413-14). Thus, the question whether the Mark IV should even be considered as a vehicle for mitigation of damages was disputed throughout the trial. Since the requested jury instruction would have invaded the province of the jury by resolving that issue in favor of Piles Wonder, it was properly refused by the trial court.

It should be emphasized, however, that although the trial judge refused to charge Piles Wonder's version of a disputed factual issue, he by no means prevented Piles Wonder from attempting to develop the issue by introduction

of evidence and testimony (A575, 122-125, 194-95), or from arguing its version of the facts to the jury (A471-72; see also A478-79). Thus, the question was correctly submitted to the jury as an issue of fact for it to resolve. Of course, the issue of whether Garrity could have reasonably prevented his lost profits under UCC 2-715 was a question of fact correctly put to the jury. *Lewis v. Mobil Oil Corp.*, 438 F.2d 500, 509-10 (8th Cir. 1971); *R.E.B., Inc. v. Ralston Purina Co.*, 525 F.2d 749, 755-56 (10th Cir. 1975). Despite the jury's determination of this factual issue in Garrity's favor (A495), Piles Wonder continues to argue its version of the facts on its cross appeal (DB16).

The authorities cited by Piles Wonder (DB14-15) do not controvert the proposition that the question of mitigation of consequential damages by reasonable cover was a proper question of fact to be resolved by the jury. Nor do they support reversal of Garrity's award of lost profits in this case.

Garrity does not disagree with the statement of law quoted from *Restatement of Contracts* §336(1) (1932). Reference to the comments on this subsection, however, clearly refutes Piles Wonder's reliance thereon:

"In general, however, it is reasonable for the plaintiff to rely upon the defendant to perform as he has promised. Also, it may be reasonable for him to expect the defendant to take the steps necessary to prevent harm after a breach has occurred; especially is this true if the breach is accompanied by assurances of the defendant that proper performance will soon be rendered and further harm prevented.

* * *

"Gains made by the injured party on other transactions after the breach are never to be deducted from the damages that are otherwise recoverable

unless such gains could not have been made had there been no breach . . . manufacturing facilities can usually be expanded to meet all demands; therefore profit made on the manufacture and sale of a second article is not deducted. And the same is true in the case of a contract to sell a non-specific article, of which the supply in the market is not limited." *Id.*, Comments a, c.

Piles Wonder made repeated assurances to make Garrity whole both at the September 1972 meeting and in subsequent correspondence (A533-36), which assurances were subsequently dishonored (A539-42). Also the question of whether Garrity would have made gains on the Mark IV in the absence of Piles Wonder's breach was put to the jury (A495) and resolved in favor of Garrity (A516).

Hitchcock v. Hunt, 28 Conn. 343 (1859), (DB14) is clearly inapposite to the issue on cross appeal. There, in a cause of action for the purchase price, a buyer sought to offset the cost of the pork sold which had been packed in defective barrels. No issue of lost profits was involved. Moreover, the buyer gave no notice of the breach to the seller, and thus afforded the seller no opportunity to repack the pork in other barrels. Thus, when the pork spoiled due to the defective packing barrels, the court allowed the buyer damages only for the defective barrels, and not for the spoiled pork, reasoning that the damage to the pork was caused not by the defective barrels, "but rather from the want of reasonable care on the part of the purchaser. . . ." *Id.* at 350-51. In the present case, there is no question but that Garrity's lost profits were caused by Piles Wonder's delivery of defective flashlights, not by Garrity's want of reasonable care.

In *Beech Aircraft Corp. v. Flexible Turburg Corp.*, 270 F.Supp. 548 (D. Conn. 1967), the issue was not whether an aggrieved buyer could have reasonably prevented lost

profits by resorting to cover, but whether a buyer's use of defective goods constituted a waiver of its right to rescind the contract. The buyer argued that insofar as it was attempting to mitigate its damages caused by seller's breach, its use of the goods was reasonable and so did not constitute a waiver of rescission. *Id.* at 563. Noting the principle of mitigation, the court held that the buyer did not act reasonably since its use destroyed the defective goods and the buyer admitted it could have obtained replacements in a few hours. Thus, the use constituted a waiver of rescission. The issue on the present appeal, as stated previously, is not rescission, but whether Garrity's lost profits could have been reasonably prevented. In *Neal-Cooper Grain Co. v. Texas Gulf Sulphur Co.*, 508 F.2d 283 (7th Cir. 1974) (DB14), the Court noted that the "question of cover and mitigation of damages is irrelevant," and that "[c]onsequential damages are not at issue on this appeal." *Id.* at 294. Thus, the court never considered the issue of whether lost profits could have been reasonably prevented by cover. Piles Wonder citation of *Apex Mining Co. v. Chicago Copper & Chem. Co.*, 340 F.2d 985, 987 (8th Cir. 1965) (DB14), is even more misplaced. There, the court stated that an argument

"that a party who does not use all possible means to mitigate the defaulter's damages is not to receive any damages, at all . . . is apparently based on a misinterpretation . . . clearly . . . the burden was on . . . the defaulting party, to prove any elements in mitigation of damages." *Id.* at 987.

The *Apex* court continued on to cite *In re Kellet Aircraft Co.*, 186 F.2d 197 (3d Cir. 1950), as showing the "proper perspective" for the rule on mitigation of damages. 340 F.2d at 987. The *Kellet* court gave the following perspective:

"The rule of mitigation of damages may not be invoked by a contract breaker as a basis for hypercritical examination of the conduct of the injured party, or merely for the purpose of showing that the injured person might have taken steps which seemed wiser or would have been more advantageous to the defaulter. One is not obligated to exalt the interests of the defaulter to his own probable detriment." 186 F.2d at 198-99, citing *City of Bridgeport v. Aetna Indemnity Co.*, 93 Conn. 277, 105 A.680 (1919).

This leaves only *L.S. Good & Co. v. H. Daroff & Sons, Inc.*, 279 F. Supp. 925, 927 (N.D. W.Va. 1968), as the precedent upon which Piles Wonder argues for reversal (DB14-15). In that case, the court denied a motion to dismiss a buyer's complaint for damages for breach of contract, holding that the buyer should be allowed to show the existence of the contract, even if it was terminable at will. Thus, the issue of mitigation was not before the court. Further, the dictum quotation relied upon by Piles Wonder (DB15) was proffered by the *L.S. Good* court without any supporting authority.

In sum, Piles Wonder's cross appeal is based on its re-argument of facts adversely determined by the jury, and a handful of cases offering no support or contradicting the proposition for which it is offered. Clearly, this singularly unpersuasive argument affords no basis upon which to upset the District Court judgment based on the jury verdict in favor of Garrity for its lost profits of \$40,000.00.

CONCLUSION

For all of the foregoing reasons, the award of pre-judgment interest by the court below was error, and the case should be reversed and remanded with instructions to strike the award of interest on the sum of \$133,446.32 from the judgment. In all other respects, the judgment should be affirmed.

April 14, 1977

Respectfully submitted,

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the within *brief* is

hereby admitted this *14th* day

of *April* 1977

Bey C. Terzian
Attorney for